

**SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE  
OF THE INTERNATIONAL CRIMINAL COURT**

**THE HAGUE WORKING GROUP**

**Complementarity**

**Second Meeting**

**30 June 2022**

Summary

*The meeting was chaired by the representatives of the ad country co-focal points, Ambassador Matthew Neuhaus (Australia), Ambassador Mirjam Blaak (Uganda).*

Ambassador Blaak provided an update on the **Dakar Seminar on complementarity and cooperation held on 23-25 May**. Ambassador Blaak thanked the Senegalese Government, and the support of the French embassy and EU delegation in Dakar for the organisation of this highly anticipated event. Discussions emphasised the importance of collective efforts in promoting and strengthening cooperation as well as ensuring the effective implementation of the principle of complementarity, with a particular focus on States from the Economic Community of West African States (ECOWAS). The conference had a big turnout with presence of Ministers of Justice and representatives of the Judiciary of 15 ECOWAS Member States, the Republic of Chad and the Central African Republic, who shared best practices and experiences in cooperation and complementarity related matters. At the conference, Ambassador Blaak promoted the work of the facilitation and the complementarity platform. The Conference concluded with the signing of the Dakar Declaration, which would be circulated by the Secretariat of the ASP.

Ambassador Neuhaus recalled that the Review Mechanism proposed the complementarity facilitation as the platform for discussion for a cluster of recommendations relating to complementarity. He noted that most of these recommendations had been allocated to the OTP. These recommendations relate to three priority areas: selection and prioritization of cases and perpetrators; situation prioritisation, hibernation and closure; and preliminary examinations.

Ambassador Neuhaus indicated that some States Parties and other stakeholders remain interested in seeing a more developed response from the OTP to better understand its proposed approach to the complementarity related IER recommendations. He noted that a paper or similar document outlining the OTP's vision on complementarity would assist in more effectively engaging States Parties on the topic, particularly with a view to building a shared understanding of key concepts, terms, and practices. While appreciating the OTP's currently very high workload, Ambassador Neuhaus was grateful to the OTP for the effective cooperation and their willingness to engage with States Parties and other stakeholders on this matter.

Mr. Mamadou-Racine Ly, Adviser and focal point of the Office of the Prosecutor, provided an **oral update from the OTP on their assessment of the complementarity-related recommendations**.

During his presentation, Mr. Ly indicated that the Office considered these recommendations to be important ones and that even before the IER process began, the OTP itself was busy considering these same issues, based on accumulated experience. Mr. Ly noted that the OTP was currently engaged in a significant process of transition, with the Prosecutor re-examining policies and practices but that, while mindful of the deadlines set out in the comprehensive action plan, it needed time and space to accomplish this process. Mr. Ly indicated that the OTP would nonetheless remain engaged and continue to update States Parties on the evolution of the work.

With regards the **initial situation and case selection – preliminary examinations (R226-229)**, Mr. Ly indicated that the Prosecutor was committed and already engaged in identifying how to better implement the strategies suggested by the experts for improving OTP's position in terms of the criteria for opening preliminary examinations, applying a higher threshold for gravity at the initial filter stage (Phase 1) and not taking feasibility into account.

With regards **selection and prioritisation of cases and perpetrators (R230-242)**, Mr. Ly noted that the prosecutor repeatedly stated his willingness to address the most commonly shared concerns related to the criteria applied during case selection and prioritisation, regarding the need for greater situational strategic planning. In this regard, the Prosecutor will always only decide to prosecute a case if there is a reasonable prospect of conviction at the end of the trial.

In relation to **situation prioritisation, hibernation and closure (R243-250)**, Mr. Ly indicated that the Prosecutor agreed on the IER report finding that the prioritisation of situations is necessary to ensure that the limited resources of the OTP are being used in the most efficient and effective way. The new policy on situation completion adopted on 15 June 2021 -an implementation of such recommendations - introduced the concept of completion of the investigation phase (meaning no new art. 5 cases intended to be investigated, and hence determines the scope of the Office's caseload in a situation) and completion of the prosecution phase (which ensures that the necessary steps are taken to complete the Office's responsibilities with regard to the caseload). He further noted that the OTP was actively reviewing the implementation of the Situation Completion policy across all situations and hopes to make relevant announcements during 2022.

Concerning the **preliminary examinations section (R251-253)**, Mr. Ly noted that the united team within the Pillars, as part of the new structure of the OTP, takes into consideration most of the concerns raised by the expert as it achieved the main objective to ensure an embedded staff organisation. The harmonisation of working methods and products is also well ongoing with the new structure.

Regarding the **length of preliminary examinations activities (R 254-261)**, Mr. Ly indicated that the Prosecutor fully recognised the risks identified by the Experts' finding that , having preliminary examinations run for multiple years, loss of potential evidence and other investigative opportunities, could result in frustration for the victims and civil society, and dissatisfaction with States Parties. In this regard, Mr. Ly noted that the OTP would be considering options and suggestions on how a reasonable duration of preliminary examinations could be part of the general plan at the opening of each preliminary examination, also considering how to make complementarity and the Court's own mandate more effective.

With regards **complementarity and positive complementarity (R262-265)**, Mr. Ly noted that following the discussions during the Complementarity facilitation meeting of 1 October 2021 the Prosecutor would launch a new policy paper on complementarity. This paper was initially planned to be launched at an upcoming regional event that was postponed to later in the year. Mr. Ly indicated that the OTP was finalising the paper for later distribution for comments and consultation. Mr. Ly highlighted that through this renewed approach, the OTP wished to take a proactive, open approach to its engagement with national authorities, in a manner consistent with the spirit and provisions of the Rome Statute, while also reinvigorating and changing the nature of the relationship between the Office and national jurisdictions. He added that this new approach would place emphasis not only on the judicial application of the principle of complementarity but also in supporting national authorities that may be able to take on greater responsibility with respect to core international crimes.

Mr. Ly noted that the paper outlined four key pillars on which these efforts will be based: creating a community for cooperation and complementarity; technology as an accelerant for complementarity; bringing justice closer to communities; and, harnessing cooperation mechanisms at the regional and international level.

Concerning the issue of **transparency of preliminary examinations (R266-267)**, Mr. Ly indicated that the OTP would continue to look for ways to best strike a balance between the need for communication and updates, with the duties of confidentiality and due discretion that guide its work. He also indicated that the Prosecutor had committed to engaging in a more structured approach to increasing and improving dialogue and communication with affected stakeholders across all situations.

Concerning a question from a State Party regarding the different understandings of the concept of positive complementarity, Mr. Ly noted that looking at it broadly speaking, one of the main objectives of the Prosecutor's vision is inclusivity. In this regard, the OTP should work together with stakeholders to determine where the OTP should emphasise its efforts in this regard, most particularly differentiating the approaches to cases when a country is unwilling and when a country is unable to genuinely carry out the investigation and prosecute the perpetrators.

Ambassador Blaak inquired regarding the timelines for a draft or the launch of the paper to be able to further discuss the assessment and implementation of the recommendations. In this regard, Mr. Ly noted that a high-level event where the launch of the policy paper was scheduled in July but was unfortunately postponed by the organisers and that the OTP was aiming at sharing it after the launch.

Ambassador Neuhaus indicated that there is a duty to the ASP and requested the paper to be shared at least after the holiday period for States Parties to be able to provide comments on the draft ahead of the ASP. Mr. Ly suggested to provide a short paper describing the policy paper for States to be able to start discussions already.

Ambassador Blaak noted that the facilitation would hold another meeting of the complementarity facilitation in the second half of the year relating to its **mandate on sexual and gender-based crimes**, which would be co-hosted with Women's Initiatives for Gender Justice. She added that further updates on the specifics of the meeting would be provided in due course.

Ambassador Neuhaus commended the OTP and the Court more broadly for the very positive spirit in which they engage. He concluded the meeting by inviting States to provide any comments in the coming months regarding these recommendations to be able to discuss them ahead of the ASP.

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